

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 505 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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ASWANI DHALARAM GOHIMAL

Versus

STATE OF GUJ.

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Appearance:

MR VASANT S SHAH for Petitioner  
Mr L.R.Pujari, AGP, for Respondent No. 1  
MR IM BENGALI for Respondent No. 2, 3

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CORAM : MR.JUSTICE J.R.VORA

Date of decision: 26/12/97

ORAL JUDGEMENT

This appeal is filed by the original complainant against State and accused in Criminal Case No.24/87 before the learned JMFC Court at Kadi for acquitting the accused, i.e. present respondents Nos.2 & 3 for the charge of offence under section 406 and 114 of the Indian

Penal Code.

2. Referring to facts, the present appellant i.e. original complainant was doing business of selling bicycles and giving bicycles on rent. Accused i.e. respondents Nos.2 & 3 herein obtained six new bicycles from the complainant on monthly rent of Rs.600/- and an agreement to that effect was executed between the parties. According to the agreement, these bicycles were to be returned to the complainant on 24th November, 1984. The present respondent No.3 was in the capacity of the guarantor of the transaction while present respondent No.2 had taken bicycles on rent. As per the case of the complainant, both these respondents sold the six bicycles to original accused No.3 and thereby committed fraud. Accused No.3 came to be discharged by the Court below vide its order dated 20th February, 1989.

3. On 15th March, 1985, the present appellant-complainant lodged a complaint before the Kadi Police Station that the accused misappropriated the bicycles which were to be returned to the complainant and hence offence was registered against the accused under section 406 and 114 of the Indian Penal Code. After investigation, Kadi Police Station requested the Magistrate to grant 'C' summary. The learned JMFC, Kadi after recording the evidence of the complainant came to believe that there was prima facie case and hence all the three accused were issued process under section 406 and 114 of the Indian Penal Code. Out of the 3 accused, as stated before, accused No.3 eventually came to be discharged by learned JMFC Kadi. But, thereafter, trial was proceeded with and ultimately the learned JMFC, Kadi, came to believe that the whole transaction was of the civil nature and there was no dishonest misappropriation of the property and therefore the necessary element, that is, mens rea was absent from the prosecution case. The learned Trial Judge relied upon a decision reported in AIR 1983 SC, 810 for filing of the complaint late and not explaining such delay. In this case, according to the Trial Court, the agreement between the parties came to an end on 24th November, 1984, but the complaint was filed by the complainant on 15.3.85 and this period of delay was not explained.

4. Learned advocate on behalf of the appellant even after repeated call out is not present. Learned APP, Mr Pujari, on behalf of respondent No.1 Government was heard. Learned advocate for respondent Nos.2 & 3, original accused, are also not present. But having scrutinized the record, it clearly appears that no

interference at all is called for or warranted in the order of the learned JMFC, Kadi, acquitting the accused for offence under section 406 and 114 of the Indian Penal Code. Under section 406, the prosecution is bound to prove the very essential element, that is, dishonest misappropriation. Here, in this case, the agreement was executed for the return of bicycles. At the most, a civil suit can lie. For the civil right whatsoever of the complainant, which can be remedied by the civil court, criminal prosecution cannot be resorted. Hence the prosecution has failed to prove that the accused, respondent No.2 & 3 had entered into the agreement with dishonest intention so as to bring mens rea and attract the provisions of section 406 of the Indian Penal Code.

5. In the result, this acquittal appeal fails and is dismissed.

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(vijn)